STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

AGL RESOURCES INC., NICOR INC., and NORTHERN ILLINOIS GAS COMPANY d/b/a NICOR GAS COMPANY	)	
	)	Docket No. 11-0046
Application for Approval of a Reorganization pursuant to Section 7-204 of the Illinois Public Utilities Act.	)	

JOINT APPLICANTS' BRIEF ON EXCEPTIONS

Dated: October 13, 2011

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BRIEF ON EXCEPTIONS

AGL Resources Inc. ("AGL"), Nicor Inc. and Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas") (collectively "Joint Applicants" or "JA") respectfully submit their Brief on Exceptions to the Administrative Law Judge's ("ALJ") Proposed Order dated September 29, 2011 ("Proposed Order"). Pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission"), 83 Ill. Adm. Code 200.830, suggested replacement language is provided as Exceptions in Attachment A to this brief.

I. EXECUTIVE SUMMARY

The Proposed Order correctly approves the Joint Applicants' request to engage in a reorganization through which Nicor Gas will become a subsidiary of AGL (the "Reorganization"). PO at 79. In arriving at this conclusion, the Proposed Order correctly finds that the Joint Applicants provided sufficient evidence to support each of the required findings for approval of the proposed Reorganization pursuant to Section 7-204 of the Public Utilities Act ("Act") (220 ILCS 5/7-204), subject to the conditions established in the Proposed Order. *Id*. at 77-78. In other words, the Proposed Order correctly concludes that the proposed Reorganization

satisfies the criterion of Sections 7-204(b)(1)-(7) and (c)(i)-(ii) of the Act. *Id*. at 15, 18[1], 19-20, 21, 22, 30-31, 35. Each of these conclusions of the Proposed Order is supported by the law, and substantial and compelling record evidence. Accordingly, the Commission should adopt the Proposed Order with respect to each of these conclusions.

The Joint Applicants, however, respectfully submit that the Proposed Order's conclusion concerning the Joint Applicants' proposed Operating Agreement is in error. PO at 69, 75 and Finding (7). The sole issue concerning the terms of the Operating Agreement is whether Nicor Gas' call center could continue to be used to solicit affiliate products, for a fee, and the Proposed Order concludes that Nicor Gas cannot use the call center for that purpose. *Id*. As described below, that conclusion conflicts with the evidence and the Joint Applicants urge the Commission to revise the Proposed Order accordingly. If, however, the Commission concurs with the Proposed Order's ultimate conclusion on this point, the analysis must be amended to remove certain statements and conclusions that are unsupported by the record and/or that go beyond the Commission's authority under the Act to impose conditions to safeguard the public interest.

A. The Proposed Order's Resolution Of The Disputed Section 7-204 Issues Complies With The Act And Is Fully Supported By The Record Evidence

1. Section 7-204(b)(1)

The Proposed Order correctly finds the Joint Applicants' evidence sufficient to satisfy the statute: "Evidence of AGL's and Nicor's prior and ongoing experience in the operation of natural gas distribution utilities, of AGL's experience with previous mergers of such utilities, of

[1] The conclusion cited here that the Joint Applicants satisfied the requirements of sections 7-204(b)(2) and (b)(3), with the conditions proposed by Staff and accepted by the Joint Applicants, only applies to the Services Agreement, the Tax Allocation Agreement and the four agreements with Sequent Energy Management LP ("Sequent"), as well as capacity release arrangements between Nicor Gas and Sequent entered into in accordance with the Federal Energy Regulatory Commission's capacity release rules. PO at 18. As discussed below, the Proposed Order conducts a separate analysis of Sections 7-204(b)(2) and (b)(3) as they apply to the proposed Operating Agreement and the Joint Applicants take exception to the Proposed Order's conclusion and related analysis adopting Staff's proposed Section 2.2(e) as a condition for approval under 7-204(b)(2) and (b)(3).

the [Joint Applicants'] binding operational and financial commitments (as described in this Order and included in Merger conditions), and of the ongoing activities to integrate the utility with the acquiring entity, collectively satisfies the statute." PO at 15.

More specifically, the unrebutted evidence here shows that AGL is a well-known and respected operator of six natural gas distribution utilities, with a successful history of providing safe, reliable and cost-effective service to approximately 2.3 million end-use customers.[2] Linginfelter Dir., JA Ex. 1.0, 1:6-8, 3:58-59, 4:68-5:93; D'Alessandro Dir., JA Ex. 2.0, 7:108-099, 7:117-8:122. The unrebutted evidence also demonstrates that AGL brings to the proposed Reorganization a team of highly qualified leaders, managers and employees, which has many years of experience running utilities effectively and efficiently, and providing safe, reliable and cost-effective energy delivery and responsive customer service. Application at 4; Linginfelter Dir., JA Ex. 1.0, 1:11-18, 2:24-36, 3:58-59, 4:68-5:93, 7:132-33; D'Alessandro Dir., JA Ex. 2.0, 7:117-8:122. Further, the unrebutted evidence demonstrates that Nicor Gas already is by far the lowest-cost provider of natural gas distribution service in Illinois. D'Alessandro Dir., JA Ex. 2.0, 5:73-76. Coupled with the Joint Applicants' substantial personnel commitments, and their pledge to honor the existing Collective Bargaining Agreement with the Union, the record here amply demonstrates that Nicor Gas customers will continue to receive the same low-cost, safe and reliable service that these customers have received for years. Linginfelter Dir., JA Ex. 1.0, 6:130-7:153, 9:196-10:205.

In arriving at this conclusion, the Proposed Order correctly rejects the arguments of Staff and AG/CUB that the integration process somehow must be completed before the Commission

[2] These six operating companies are located in Florida, Georgia, Maryland, New Jersey, Tennessee and Virginia: Atlanta Gas Light in Georgia; Chattanooga Gas in Tennessee; Elizabethtown Gas in New Jersey; Elkton Gas in Maryland; Florida City Gas in Florida; and Virginia Natural Gas in Virginia. Application at 2; Linginfelter Dir., JA Ex. 1.0, 1:6-8, 4:69-82.

can render the finding required under Section 7-204(b)(1): "A more appropriate test is whether the ongoing integration process is soundly conceived, adequately staffed and progressing satisfactorily. The [Joint Applicants] claim that it is and *no party argues to the contrary*." PO at 13 (emphasis added). In this regard, the Proposed Order understandably relies upon the testimony of Joint Applicants witness Linginfelter, who is the Executive Vice President in charge of utility operations for AGL's six gas distribution utilities and was directly involved in AGL's acquisition of four of those gas distribution utilities. Linginfelter Dir., JA Ex. 1.0, 1:11-14, 2:25-34; Linginfelter Sur., JA Ex. 13.0, 8:171-74.

Mr. Linginfelter testified, *without contradiction* as the Proposed Order recognizes (at 13), that the current and ongoing integration process between AGL, Nicor Inc. and Nicor Gas personnel is going just as planned. Linginfelter Sur., JA Ex. 13.0, 11:234-13:273; Tr. 655-56 (Linginfelter). Indeed, work on final plans will continue through fall 2011 and beyond the time of closing. Linginfelter Sur., JA Ex. 13.0, 12:265-13:273; JA Ex. 20 at NRE 005112-5147 (JA Supp. Response to Staff Data Request RWB 3.08 and Att. 1); JA Ex. 21.0 at NRE 005571 (JA Response to Staff Data Request 1.01); Tr. 470 (O'Connor); Tr. 655-56 (Linginfelter).
Mr. Linginfelter further testified, again without contradiction, that the Joint Applicants have utilized nearly 400 experienced individuals and expended more than 31,000 labor hours on integration work (as of May 30, 2011), and that AGL has the "*ability*," in the words of Section 7-204(b)(1), to continue operating Nicor Gas to meet that Section's standards. Linginfelter Sur., JA Ex. 13.0, 11:229-12:264; JA Ex. 21.0 at NRE 005573 and NRE 005576-5584 (JA Response to Staff Data Request 1.01 and Exhibit 1 thereto).

On a final note regarding Section 7-204(b)(1), the Proposed Order correctly rejects the eleventh-hour request of Local Unions No. 19, 117, 134, 150, 176, 364, 461 and 701,

International Brotherhood of Electrical Workers, AFL-CIO (collectively the "Union") to impose merger conditions concerning personnel classifications or individual employees as wholly without an evidentiary basis. PO at 14-15. The Proposed Order recognizes that "[i]t was up to the IBEW to lay the groundwork for the relief it seeks in its briefings, but it did not do that. It did not even use its opportunity to probe the [Joint Applicants'] promises and intentions through cross-examination." *Id*. at 15. As the Proposed Order states, the Union did not even appear at the evidentiary hearings in this proceeding, thereby accepting "the risk that the evidentiary record will not support any relief it seeks." *Id*. at 14.[3]

2. Section 7-204(b)(7)

Section 7-204(b)(7) imposes a single, straightforward requirement: "the proposed reorganization is not likely to result in any adverse rate impacts on retail customers." 220 ILCS 5/7-204(b)(7). In comparison, Section 9-230, by its clear and unambiguous terms, applies in a case to determine "a reasonable rate of return upon investment for any public utility in any proceeding to establish rates or charges." 220 ILCS 5/9-230. As the Joint Applicants previously emphasized, these are two different statutes, in two different Articles, establishing two different requirements that apply in two different types of cases. JA RB at 12-14. For those reasons, the Proposed Order properly applies the law and rejects Staff's claim that Section 9-230 of the Act must be addressed in this proceeding under the rubric of Section 7-204(b)(7). Instead, the Proposed Order correctly concludes that Section 9-230 would apply only in a rate case, and that "proper application of Section 9-230 would scour any capital cost increase from [Nicor Gas'] ROR if it arises from affiliation with a non-utility." PO at 24.

[3] The Commission should apply the Proposed Order's conclusions regarding the Union's utter lack of involvement in this proceeding and its failure to provide any evidentiary support for its requests with equal force to dismiss the statements made by representatives of the Union at the Commission's bench session on October 5, 2011.

The Proposed Order also correctly rejects Staff's proposal presented in oral testimony to impose an unprecedented "cap" on Nicor Gas' post-merger common equity ratio as a condition on the proposed Reorganization. *Id*. at 25-26. As an initial matter, the proposal is unnecessary given that the Joint Applicants have agreed with Staff to fix the base rates of Nicor Gas at their current rates for a period of three years following the closing of the proposed Reorganization. *See* August 24, 2011 Stipulation. Further, the proper time to consider this issue is if and when a future case is initiated concerning Nicor Gas' rates. And the Proposed Order properly concludes that offering dicta on that issue now, outside the context of a rate case, will not assist the Commission in a future case. *Id*. at 25-26. Finally, the Proposed Order correctly recognizes that, in all events, Staff's proposal is unnecessary given proper application of Section 9-230 in a future rate case: "under Section 9-230, any higher capital cost resulting from [Nicor Gas'] merger would become the burden of shareholders, with ratepayers responsible only for a reasonable ROR – *i.e.*, an ROR based on [Nicor Gas'] pre-merger credit standing." *Id*. at 26.

In short, the law supports the Proposed Order's conclusions with respect to the proper application of Sections 7-204(b)(7) and 9-230 of the Act.[4]

3. Section 7-204(c)

The Proposed Order correctly approves the August 24, 2011 Stipulation between Staff and the Joint Applicants, with revisions as to the allocation of savings, as sufficient to support the findings required by the two sub-parts of Section 7-204(c). PO at 31-35. In particular, the Proposed Order correctly concludes that Section 7-204(c) shall be applied and is satisfied here "by allocating all reorganization-related savings to ratepayers and precluding recovery by NG of any costs incurred in accomplishing the Reorganization." PO at 35. In finding Section 7-204(c)

[4] As discussed below, the Joint Applicants take exception to the Proposed Order's adoption of the speculative claims by Staff and AG/CUB that a credit rating downgrade will negatively affect Nicor Gas' post-merger capital costs (PO at 30).

satisfied, the Proposed Order correctly rejects AG/CUB's original argument that savings must be quantified before the Reorganization can be approved, as well as their objections in briefing to the Stipulation as purportedly containing loopholes that could be exploited to the disadvantage of ratepayers. *Id*. at 33-34. In rejecting AG/CUB's objections, the Proposed Order recognizes that AG/CUB's "observations" do not affect the savings allocation specified in the Stipulation and, further, finds that the Commission's authority under Section 7-204(c)(i) does not "override" the Commission's test year regulations, "which afford utilities specified test year 'options'." *Id*. The Proposed Order's conclusions with respect to Section 7-204(c) are clearly supported by the evidentiary record.

B. The Proposed Order's Resolution Of The Disputed Operating Agreement Issue Is Incorrect As It Is Not Supported By The Record Evidence

The Joint Applicants respectfully disagree with certain portions of the Proposed Order's analysis regarding the sole remaining disputed issue in Nicor Gas' inter-affiliate Operating Agreement, *i.e.*, whether Nicor Gas may continue offering call center solicitation in support of its affiliates' services, as well as the Proposed Order's adoption of Staff's recommendation to eliminate the provision by which that solicitation is offered as a condition of approval both for purposes of the proposed Reorganization and as an inter-affiliate agreement. The Proposed Order should be amended to adopt the Joint Applicants' Section 2.2(e) as a condition of approval instead of Staff's language because the record evidence demonstrates that the proposed Operating Agreement with the Joint Applicants' Section 2.2(e) meets the requirements of all applicable requirements of the Act.[5]

Specifically, approval of the Joint Applicants' Section 2.2(e) will permit the continuation of activities that have been in place for more than a decade, in accordance with Nicor Gas'

[5] The evidence is fully discussed in the Joint Applicants' OA Briefs, which are incorporated herein.

current, Commission-approved operating agreement, *i.e.*, Nicor Gas' call center activities giving customers the choice to hear about affiliate products and services upon completion of the utility-related portion of a call. One of those products is Gas Line ComfortGuard ("GLCG") offered by Nicor Gas' affiliate, Nicor Energy Services Company's ("Nicor Services"). Nearly all of the Proposed Order's analysis regarding the Operating Agreement relates to GLCG, which is a warranty product, regulated by the Illinois Department of Insurance, providing repair/replacement services to certain customer-owned piping (including flexible connectors inside the home). In this regard, the Proposed Order mirrors Staff and AG/CUB in targeting GLCG, a product undisputedly not even subject to Commission regulation. The evidentiary record shows that: (1) the marketplace itself has spoken strongly in favor of the GLCG product; (2) the Commission has previously approved the utility's activities relating to the product; (3) the product serves the public interest; and (4) the legal obligation of the utility does not extend to offering a similar product or services. *See* JA RB-OA at 3-4. Accordingly, the Commission should adopt the revisions the Joint Applicants offer to the Proposed Order regarding this issue.

In the alternative, if the Commission determines to adopt the Proposed Order's condition that the Operating Agreement include Staff's recommended Section 2.2(e) (PO at 69, 75 and Finding (7)), the Commission should nevertheless amend the Proposed Order. At a minimum, amendments are necessary to remove certain unsubstantiated and unnecessary statements and conclusions that are unsupported by the record and/or that go beyond the Commission's authority under the Act to impose conditions to safeguard the public interest. Because these statements and conclusions are unsupported by the evidence and the law, the Commission should amend the Proposed Order to adopt the Joint Applicants' replacement language regarding the inter-affiliate Operating Agreement, which is set forth in Exception No. 3.

II. ARGUMENT

A. The Final Order Must Be Amended Regarding Approval Of The Operating Agreement

1. The Evidence Supports Nicor Gas' Call Center's Continued Ability To Solicit Affiliate Products And Services

The Proposed Order's conclusion regarding the Operating Agreement (PO at 69, 75 and Finding (7)) should be amended to adopt the Joint Applicants' proposed language for Section 2.2(e). The Joint Applicants' evidence and OA Briefs, which are incorporated herein, fully support amending the Proposed Order in this respect. Approval of the Joint Applicants' proposed language for Section 2.2(e) will permit continued call center solicitation for Nicor Gas' affiliates' services and products, including GLCG. The record evidence demonstrates Nicor Gas should be permitted to continue offering such solicitation, *as it has for more than ten years*, and that the concerns raised by Staff and AG/CUB—and adopted in large part by the Proposed Order—regarding this unregulated product do not bear on the legal sufficiency or propriety of the Operating Agreement and are unsupported by the evidence.

For example, the evidence demonstrates that:

- GLCG is a warranty product that assists homeowners with repairs to gas leaks on pipes in the home interior, appliance connections and shut off valves (O'Connor Dir., NG Ex. 1.0, 12:256-57);
- GLCG has been offered for more than a decade and, as of 2009, approximately 440,000 Nicor Gas residential customers were GLCG customers (O'Connor Reb., NG Ex. 2.0, 26:568, 56:1257);
- Nicor Gas has been offering customer solicitation services in support of GLCG for more than ten years consistent with its Commission-approved Operating Agreements (*Id*. at 26:573-75);
- GLCG receives a *remarkably* low level of customer complaints, which is an objective measure of customer satisfaction with GLCG (*Id*. at 40:899-42:937);

- GLCG provides a valuable public safety service by addressing the serious dangers posed by gas leaks within a home due to faulty brass connectors and damage to internal gas piping (Erickson Reb., NG Ex. 3.0, 10:253-60);

- Through GLCG, Nicor Services has replaced more than 20,000 potentially dangerous uncoated brass appliance connectors in the homes of its customers, performed more than 65,000 other repairs, and inspected another 11,000 homes (*Id*. at 6:173-76);

- An affiliate of the Peoples Gas Light & Coke Company ("Peoples Gas") offers a product—the Pipeline Protection Plan ("PPP")—that is similarly priced to GLCG and sold through similar solicitation services provided by the utility (Ros Reb., NG Ex. 4.0, 16:389-91; O'Connor Sur., NG Ex. 5.0, 21:455-57; Staff Group Cross Exhibit 1 (SDR-1, SDR-3 and SDR-4));

- The Commission has recently considered and approved Peoples Gas affiliate agreements under which Peoples Gas provides solicitation services for PPP (O'Connor Sur., NG Ex. 5.0, 21:455-60); and

- Nicor Gas is under no obligation to repair customer-owned facilities located in the home at all, as provided in Nicor Gas' Commission-approved tariffs and recognized by the Illinois Supreme Court. Northern Illinois Gas Company, Ill.C.C. No. 16 – Gas, 3rd Revised Sheet No. 35; *Adams v. Northern Illinois Gas Company*, 211 Ill. 2d 32, 48 (2004).

In short, the evidence shows that there is no basis to adopt the Proposed Order's conclusion suddenly prohibiting Nicor Gas from marketing affiliate products through its call center activities.

If the Commission agrees with the Joint Applicants in this respect, the Joint Applicants propose revisions to the Proposed Order that: (i) adopt the Joint Applicants' proposed language for Section 2.2(e) of the Operating Agreement as a condition of approval on pages 69 and 75 and in Finding (7); (ii) strike all statements in the Proposed Order that Nicor Gas is prohibited from solicitation of its affiliates' products; and (iii) strike the entirety of the following sections of the Proposed Order—Section IV.E.2.b on pages 45-54, Section IV.E.2.d.2-3 on pages 58-67, Section IV.E.3 on pages 68-75, and Findings (8) and (9).

2. If The Commission Determines That Staff's Proposed Section 2.2(e) Is Appropriate, The Commission Must Modify The Proposed Order To Remove Certain Statements And Conclusions That Are Contrary To The Commission's Statutory Authority Or To The Evidence

If the Commission determines to adopt the Proposed Order's condition that the Operating Agreement must include Staff's recommended Section 2.2(e) (PO at 69, 75 and Finding (7)), the Commission must amend the Proposed Order to remove certain statements and conclusions that are unsupported by the record and/or that go beyond the Commission's authority under the Act to impose conditions to safeguard the public interest.[6] For the reasons set forth below, the Commission should amend the Proposed Order as described below and set forth in Exception No. 3 to limit the analysis of the solicitation issue to those matters legally within its purview and supported by the record evidence.

a. The Proposed Order Improperly Extends The Commission's Authority To The Review Of Marketing Materials For Affiliate Products Like GLCG

The Proposed Order finds that the Commission is "empowered" by Sections 7-101 and 7-204(f) of the Act to impose conditions "to safeguard the public interest" and "to protect the interests of the public utility and its customers," respectively. PO at 54-55. It is under this "public interest" standard that the Proposed Order improperly extends the Commission's reach to review the language used in the GLCG solicitation scripts, even though the Proposed Order repeatedly recognizes that Nicor Services and GLCG are not subject to the Commission's jurisdiction.[7] PO at 55, 67, 69.

[6] The Joint Applicants note that the Commission could maintain the concerns expressed in the Proposed Order with respect to public interest issues without prohibiting Nicor Gas' solicitation support in its entirety, or, at a minimum, without reaching the unsubstantiated conclusions discussed herein.

[7] The Proposed Order's analysis admittedly focuses on "whether [Nicor Services] supplies customers with sufficient information to decide whether a service contract meets their needs and expectations." PO at 58.

While it is certainly true that the Commission regulates in favor of the public interest, it is equally true that the Commission's jurisdiction extends only to utilities' products, and that jurisdictional reach is based on the notion that utilities are monopolies for which there is no competitive market. *See, e.g., Peoples Energy Corp. v. Illinois Commerce Comm'n.*, 142 Ill. App. 3d 917, 923 (1st Dist. 1986) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction."). The Proposed Order recognizes this very limitation by relying on the Commission's decision in *CUB v. Illinois Bell Telephone,* Docket No. 00-0043. PO at 55, n. 312. While the Commission recognized in that decision that it has the authority to "protect[] utility customers from misleading sales representations," that authority extends only to *utility* products and services, not affiliate products and services:

> …[T]he Commission believes that misleading marketing practices can constitute unjust and unreasonable conduct within the meaning of the Public Utilities Act. … We are confident that these general grants of authority include *the specific power to supervise the marketing of public utility services to the public*. Therefore, we hold that we have the power to apply Sections 8-501 and 9-250 of the Public Utilities Act to the allegations of CUB's complaint and, if warranted, use the remedial powers set forth in those and other sections to proscribe unlawful practices and impose affirmatively duties promoting just and reasonable behavior.

CUB v. Illinois Bell Telephone, Docket No. 00-0043, Order at 10-11 (Jan. 24, 2001) (emphasis added). Accordingly, *Illinois Bell* is inapplicable here, and does not vest the Commission with authority to review the affiliate marketing of Nicor Services.

Indeed, Illinois law—with only very limited, specific, and clearly stated exceptions (*e.g.*, regulation of Alternative Retail Electric Suppliers)—does not allow Commission regulation of competitive and non-utility products, on the ground that the market disciplines those products. *See, e.g.*, 220 ILCS 5/16-115 (providing for certification of alternative retail electric suppliers).

Here, the evidence demonstrates that there is a competitive market for warranty products like GLCG (*see* Ros Reb., NG Ex. 4.0, 10:220-23), so there is no justification for the Commission to make determinations as to whether unregulated products offered by unregulated entities are in the public interest. This is especially true where: (1) the evidence shows that a large segment of customers have already specifically determined that GLCG *is* in their interest and (2) GLCG is expressly subject to oversight by the Illinois Department of Insurance under the Illinois Service Contract Act. 215 ILCS 152/1 *et seq*.; O'Connor Reb., NG Ex. 2.0, 31:697-709, 56:1267-57:1270.

Finally, the Proposed Order errs in concluding that the Commission may determine whether the public interest is impacted by the "entanglement" of the regulated utility in the solicitations of an unregulated product or service. PO at 55. In reaching this conclusion, the Proposed Order relies upon the Commission's decision in *Illinois-American Water Company*, Docket No. 02-0517 ("*IAWC*"). PO at 56. However, *IAWC* does not provide a basis for the Commission to rule upon whether the marketing at issue here is in the public interest. As even the Proposed Order recognizes, in *IAWC* the Commission directly tied the utility's ability to market its affiliate's service to a showing that the service is "properly priced" or "legitimately necessary":

> *In the absence of any substantive evidence* demonstrating that the [affiliate's water line protection program] is properly priced or is even legitimately necessary, it is not in the public interest to allow IAWC to lend its name and assistance in marketing the [affiliate's water line protection program] to Illinois rate payers.

IAWC, Docket No. 02-0517, Order on Reopening at 16 (Sept. 16, 2003) (emphasis added). Here, the Proposed Order correctly finds that the record evidence does not support a conclusion that GLCG is either improperly priced or unnecessary. PO at 57-58. The Proposed Order further finds that the record evidence shows that "some customers have derived actual safety benefit

from GLCG." PO at 57. Thus, *IAWC* is clearly distinguishable from the circumstances here[8], and does not support Commission review of the GLCG solicitation scripts.

Because the Proposed Order does not—and cannot on the record evidence—make the threshold finding that GLCG is improperly priced or unnecessary, the Commission should amend the Proposed Order to remove any analysis of whether the GLCG solicitation is misleading by striking the entirety of Section IV.E.2.d.2 on pages 58-63 of the Proposed Order, as well as the sentence in parentheses just before Section IV.E.2.d.1 on page 56.

b. If The Commission Determines To Extend Its Authority To Review The GLCG Solicitation Scripts, The Commission Must Modify The Proposed Order To Remove The Finding That Such Scripts Are Misleading

If, in spite of the law demonstrating otherwise, the Commission extends its authority to review the GLCG solicitation scripts, the Commission must nevertheless revise the Proposed Order to delete findings that are unsupported by the evidence. In particular, the Joint Applicants take exception to the Proposed Order's conclusion (at 63) that GLCG solicitations are misleading with respect to the fact that Nicor Gas may make similar repairs on an as-needed basis.[9] That conclusion is not supported by the record evidence. The record evidence also demonstrates that the Proposed Order's analysis related to this conclusion contains statements that are unsubstantiated and unnecessary to the prohibition on Nicor Gas from continuing to market GLCG.

[8] The Joint Applicants' OA Briefs discussed at length other distinguishing characteristics between this proceeding and *IAWC*. JA IB-OA at 36-38 and JA RB-OA at 12-14. Indeed, even the Proposed Order recognizes that *IAWC* is distinguishable because there "a prospective (rather than existing) affiliate service was at issue." PO at 58, n. 328.

[9] There is no dispute that, to the extent that Nicor Gas does provide such repairs, it does so as an accommodation depending upon the availability of materials, the technician's time and expertise, and the customer's willingness to pay the repair charges. *See* O'Connor Reb., NG Ex. 2.0, 43:970-74.

First and foremost, Illinois law imposes no obligation on Nicor Gas to provide repair services to customer-owned facilities—whether through GLCG or otherwise. While the Proposed Order (at 74) correctly refrains from imposing any requirement to repair on Nicor Gas, its reasoning implies that Nicor Gas must affirmatively disclose the availability of its repair services in order to avoid conveying the "false impression" that GLCG is the only available repair service for customer-owned facilities. PO at 60-62. But that reasoning ignores that Nicor Gas' exposure to potential liabilities for damages and injuries caused by customer-owned gas pipes and appliances is limited under Nicor Gas' tariffs and Illinois law. *Adams v. Northern Illinois Gas Company*, 211 Ill. 2d 32, 48 (2004); Northern Illinois Gas Company, Ill.C.C. No. 16 – Gas, 3rd Revised Sheet No. 35; *Sheffler v. Commonwealth Edison Co.*, 2011 Ill. LEXIS 1099, at *16 (Ill. June 16, 2011) ("Once the Commission approves a tariff, the tariff is a law, not a contract, and has the force and effect of a statute.") (internal quotation marks and citation omitted).

And there is good reason for the law to limit Nicor Gas' exposure as it does. For Nicor Gas to offer GLCG—or similar services through some other product—under a Commission mandate, the utility would need to assume the risk associated with offering what is tantamount to an insurance-type product on customer-owned facilities. O'Connor Reb., NG Ex. 2.0, 51:1151-55. This is not a risk that Nicor Gas is required to assume, nor one that ratepayers should be liable for. *Id*. at 51:1153-52:1157. It would not be prudent for Nicor Gas, and by extension its ratepayers, to assume this insurance-type risk. *See Adams*, 211 Ill. 2d at 50 (recognizing that the common law rule in Illinois that limits a gas utility's liability as to customer-owned facilities, and the exception to such rule where the utility has knowledge, "serve the concept that a gas company is not an insurer for any injury sustained as a result of escaping gas, but rather is liable

only for its negligence"). The Act's goal of providing utility ratepayers with reliable service at reasonable rates is best served by limiting the utility's duty to provide repair services for customer-owned facilities, not requiring it to do so.

Further, there is absolutely no evidence in the record that (i) the scripts have actually confused even a single customer, (ii) any customer has assumed that without GLCG there will be no service from Nicor Gas, or (iii) any customer has assumed that "if [Nicor Gas] itself offered inspection and repair services for customer-owned infrastructure, it would disseminate that information." PO at 61. On the other hand, there is substantive evidence showing that GLCG receives a remarkably low level of customer complaints. O'Connor Reb., NG Ex. 2.0, 40:899-42:937. In fact, this absence of complaints is *the only evidence* in the record with respect to whether actual customers of GLCG believe that they have been treated fairly and whether GLCG provides actual value. Accordingly, statements in the Proposed Order that assume what customer beliefs are in response to the scripts must be removed from the Proposed Order as they are wholly without evidentiary support.[10]

Moreover, the Proposed Order's conclusion ignores the record evidence showing that the solicitation scripts are clear and accurate in presenting undisputed facts and tracking the law that governs here. For example, the script excerpted in the Proposed Order contains language stating that "customers are responsible for repairing any gas leaks that occur inside the home." PO at 60-61, quoting Staff Ex. 2.0, Att. G, at 1. This language correctly reflects that Nicor Gas is not responsible to make repairs to customer facilities. O'Connor Reb., NG Ex. 2.0, 29:637-48, 62:1391-92; Staff IB-OA at 19. In *Adams*, the Illinois Supreme Court confirmed that Nicor Gas

[10] The same reasoning applies to support striking the Proposed Order's materiality analysis (at 62), because it also relies upon assumptions regarding customer beliefs that are not supported by any record evidence.

has no responsibility to protect against dangerous conditions involving gas lines or appliances in a customer's home if the utility is not aware of the danger. *Adams*, 211 Ill. 2d at 48. Instead, the consumer is responsible for the facilities within the home because "[t]he consumer, by application for gas service, assumes the burden of inspecting and maintaining the pipes and fittings on the consumer's property in a manner reasonably suited to meet the required service." *Id*. at 47. Nicor Gas' tariff similarly states that Nicor Gas "has no responsibility for the design, installation, operation, maintenance, or condition of the Customer's equipment." Northern Illinois Gas Company, Ill.C.C. No. 16 – Gas, 3rd Revised Sheet No. 35.

Another script contains language stating that "the utility is only legally responsible to make the situation safe." Staff Ex. 2.0, Att. G, at 1. This language correctly states the utility's legal duty even where the utility has knowledge of a dangerous condition inside the home—to make the situation safe—as set forth in Nicor Gas' tariffs and *Adams*. In *Adams*, the Court recognized that "where it appears that a gas company has knowledge that gas is escaping a building occupied by one of its consumers, it becomes the duty of the gas company to shut off the gas supply…." *Adams*, 211 Ill. 2d at 48.

Given the holdings in *Adams*, the Proposed Order correctly recognizes that (i) "a gas utility has no common law duty, absent actual or constructive knowledge of a dangerous condition, to take any action regarding customer-owned gas piping and connectors," and (ii) even with such knowledge, "the utility's common law duty is to provide warning and stop gas flow, *not to repair*." PO at 74 (emphasis added). However, the Proposed Order fails to consider these governing legal principles in finding the scripts misleading because they do not disclose the availability of repair services from the utility. This internal inconsistency can be remedied by removing the finding from the Proposed Order that the scripts are misleading.

The same script also contains language stating that the property owner may have to hire an independent contractor to make repairs. Staff Ex. 2.0, Att. G, at 1. This language correctly reflects that the customer may have to call a contractor to address a leak that is the responsibility of the customer. O'Connor Reb., NG Ex. 2.0, 44:996. The script further contains language correctly reflecting that repairs may not occur right away. Staff Ex. 2.0, Att. G, at 1; O'Connor Reb., NG Ex. 2.0, 62:1392-93. Finally, as even AG/CUB concede (AG/CUB IB-OA at 18, 19), there are no affirmative statements in the scripts that Nicor Gas technicians will *only* perform inspections or make repairs if the customer is enrolled in GLCG. None of the above facts about the contents of the scripts are disputed.

Finally, the unrebutted record evidence also shows that Nicor Gas always seeks to ensure script clarity and accuracy. O'Connor Reb., NG Ex. 2.0, 62:1379-80. The steps taken include reviews of proposed script changes by multiple personnel and a review of customer complaints. *Id*. at 62:1380-81. In addition, Nicor Gas has numerous processes and procedures in place to ensure quality control of the customer solicitation process at the call centers. *Id*. at 59:1324-61:1356. Staff witness Sackett admitted that a change was made to a script to notify potential customers of GLCG earlier in the call that they are purchasing a product from an affiliate. Sackett Dir., Staff Ex. 2.0, 27:642-28:650. And Mr. Sackett expressly acknowledged during cross-examination that the scripts used at Nicor Gas' call center now give the disclosure regarding the offering of affiliate products *before* the solicitation is made for such products. Tr. 310 (Sackett).

c. The Proposed Order Improperly Finds That Nicor Gas' Solicitation Support Of Affiliate Products Subsidizes Nicor Services

In addition, the Joint Applicants take exception to the Proposed Order's conclusion that Nicor Gas' provision of marketing in support of affiliate products like GLCG constitutes a subsidy for Nicor Services. PO at 54, 70, 75 and Finding (9). The record evidence does not support this conclusion as there is no dispute that the Joint Applicants and Staff have agreed to broaden the definition of prevailing price and make other pricing changes in the Operating Agreement that will provide even further protections against subsidization by ensuring that Nicor Gas receives a fair and equitable recovery of costs it incurs in providing resources to Nicor Services. *See* Section 5.1(b)(iv) in JA Ex. 7.1 at 9-10. Further, Nicor Gas' expert witness, who is a Ph.D. economist, testified that, even under the current Operating Agreement, Nicor Gas customers are not subsidizing affiliate products like GLCG. Ros Reb., NG Ex. 4.0, 32:777-33:787.

d. The Proposed Order Improperly Finds That Nicor Gas' Solicitation Support Of Affiliate Products Is Anti-Competitive

The Joint Applicants also take exception to the Proposed Order's conclusion that Nicor Gas' provision of marketing in support of affiliate products like GLCG has an anti-competitive impact in Nicor Gas' service territory. PO at 67, 70, 75. The record evidence similarly does not support this conclusion.[11] There are no competitors of any Nicor Gas affiliate arguing that any services provided by Nicor Gas to its affiliates are unfair and, in fact, the Retail Energy Supply Association, Interstate Gas Supply of Illinois and The Manchester Group all withdrew their

[11] The record evidence also does not support the Proposed Order's dismissal of Nicor Gas' reliance on self-insurance as not "useful." PO at 50-51. Nicor Gas provided empirical evidence that self-insurance competes with GLCG in the estimated demand model for GLCG submitted into evidence as NG Ex. 7.1. Moreover, there is strong, consistent support in the economic literature for the proposition that self-insurance can and does compete against market insurance, and this principle has been accepted by antitrust agencies. Ros Sur., NG Ex. 7.0, 8:176-9:179.

testimony from this proceeding because their concerns were resolved. *See* NG Ex. 8.0. Nicor Gas' expert economist witness also provided unrebutted testimony that GLCG is competitive because there are other providers of similar products, it is provided in a competitive market, and there is no essential or utility service involved in provision of GLCG. Ros Reb., NG Ex. 4.0, 10:220-23.

e. The Proposed Order Improperly Finds That The Prohibition On Nicor Gas' Solicitation Support Of Affiliate Products Will Not Impact Ratepayers

The Joint Applicants further take exception to the Proposed Order's conclusion that there will be no rate impact from the prohibition on Nicor Gas' solicitation support of affiliate products. PO at 70-72. The evidence demonstrates that the services Nicor Gas performs to support GLCG provide monetary benefits to ratepayers, regardless of their quantification. O'Connor Reb., NG Ex. 2.0, 26:569-71. In addition, Nicor Gas' costs of operating the call center are reduced. O'Connor Dir., NG Ex. 1.0, 12:243-47. For example, when call center representatives engage in services supporting GLCG, Nicor Gas "can charge out some of the costs associated with the buildings and the telephone lines, et cetera." Tr. 216 (O'Connor). And the staffing level at the call center is no more than what is needed to support the operation of the utility and any call center work for Nicor Services generates revenue that covers costs that would otherwise be borne by ratepayers for the same level of call center staffing. Tr. 242-43 (O'Connor). In other words, the Nicor Gas call center is only staffed for Nicor Gas' operational requirements and no additional staff is dedicated to work for Nicor Services. Moreover, the Proposed Order exacerbates the detrimental impact on ratepayers by extending the prohibition on Nicor Gas' solicitation beyond GLCG to any support of any affiliate product or service, thereby

foreclosing Nicor Gas from any future opportunity for revenue from any such solicitation services that would directly benefit ratepayers.

B. The Final Order Should Remove The Speculative Conclusion That Nicor Gas' Credit Rating Will "Likely" Decline And Cause Nicor Gas' Post-Merger Capital Costs To Rise

The Proposed Order correctly concludes that, "[i]n view of the expected effect of proper implementation of Section 9-230" in future ratemaking proceedings, the proposed Reorganization is not likely to result in any adverse rate impacts on retail customers. PO at 31. Thus, the Proposed Order agrees with the Joint Applicants' position that Section 9-230 directs the Commission "to protect consumers from the effect, if any, of unregulated activities by ensuring that the approved return excludes their effect," and "[n]othing in the reorganization affects, impairs, or even implicates that function." Cave Sur., JA Ex. 14.0, 5:97-100.

However, in reaching that ultimate conclusion, the Proposed Order makes the unsupported interim conclusion that a "likely" credit rating downgrade by S&P "will negatively affect [Nicor Gas'] cost of long-term debt, which will, in turn, negatively affect its cost of equity." PO at 30. In doing so, the Proposed Order improperly adopts the speculative claims by Staff and AG/CUB in this respect, even though the Proposed Order simultaneously rejects the arguments of Staff and AG/CUB that the capital cost increase will result in an adverse impact on Nicor Gas' rates. PO at 22, 24. The Commission should amend the Proposed Order to remove this speculative and unnecessary conclusion in the Section 7-204(b)(7) analysis.

Even if one ratings agency were to downgrade Nicor Gas as found likely by the Proposed Order, any conclusion that this would increase Nicor Gas' overall cost of capital is speculative. For that to occur requires several additional assumptions, including about how and when Nicor Gas might issue and price debt after such a downgrade (existing debt is embedded) and

concerning Nicor Gas' capital structure. There is no basis in this record for assuming, without any other evidence, that a *likely* one-step downgrade by only one agency translates into a *likely* increase in overall capital costs. There is, therefore, no basis for the Proposed Order's speculative conclusion that a credit rating downgrade by S&P will "likely" increase Nicor Gas' cost of capital if the proposed Reorganization is approved. Cave Reb., JA Ex. 9.0, 6:124-29.

The Joint Applicants offer revised language regarding this issue in Exception No. 1.

C. Other

The Proposed Order correctly approves the Joint Applicants' "commitment to refrain from increasing [Nicor Gas'] base rates before the end of the third year following closure of reorganization." PO at 30. This commitment was memorialized by the Joint Applicants in the August 24, 2011 Stipulation with Staff and included the following language set forth in the Proposed Order:

> NG may file at its option a base rate case, in a time consistent with the provisions of the Act and the Commission's Rules, which would implement new distribution rates no earlier than three years following the date the proposed Reorganization closes. (To illustrate this proposal, if the Reorganization closes on November 1, 2011, NGs' base rates shall be fixed until November 1, 2014. NG would be allowed to file a general rate case at a time that would allow new rates to go into effect on or after November 1, 2014.) JA retain the right to request that the Commission waive the timing provision set forth above if the financial integrity of NG is jeopardized to the extent of negatively affecting customers.

PO at 32. The Proposed Order then adopts this commitment nearly verbatim, including the illustration in parenthesis above, as a required condition of approval. PO, Appendix A, ¶ 21. However, in discussing the parameters of the waiver portion of that commitment, the Proposed Order states: "By approving this commitment as a merger condition, the Commission affords [Nicor Gas] only what the commitment describes – an opportunity to 'request' a waiver. [Nicor Gas] cannot commence a rate proceeding during the three-year period without first obtaining the

waiver…." PO at 31. The language restricting Nicor Gas from even filing a rate proceeding during the three-year period without obtaining a waiver is inconsistent with Condition No. 21, which expressly allows Nicor Gas to file "a base rate case, in a time consistent with the provisions of the Act and the Commission's Rules, which would implement new distribution rates no earlier than three years following the date the proposed Reorganization closes." PO, Appendix A, ¶ 21. To remedy this apparently inconsistent language, the Joint Applicants offer revised language regarding this issue in Exception No. 2.

Attachment A also provides suggested corrections to minor language errors reflected in replacement language throughout the document.

III. CONCLUSION

WHEREFORE, for each of the reasons set forth herein and within their Initial and Reply Briefs, the Joint Applicants respectfully request that the Proposed Order be modified consistent with the positions set forth herein and with the replacement language in the Joint Applicants' Exceptions in Attachment A and, as modified, be adopted by the Commission.

Dated: October 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John E. Rooney, certify that I caused a copy of the Joint Applicants' Brief on Exceptions to be served upon the service list in Docket No. 11-0046 on October 13, 2011.

/s/ John E. Rooney
John E. Rooney